No. 12,128

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERT ADELMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, hereinafter called the Court below, denying appellant's motion to correct the judgment and sentence heretofore imposed against him. (Tr. 13.) The Court below had jurisdiction of the motion to correct its judgment and sentence under the provisions of Title 28 U.S.C.A., Section 2255. This Honorable Court has jurisdiction to review the order of the Court below denying the motion herein under authority of said Title 28 U.S.C.A., Section 2255.

OPINION BELOW.

The opinion of the Court below, which is incorporated in its order denying motion to correct judgment and sentence, reads as follows:

"ORDER DENYING MOTION TO CORRECT JUDGMENT AND SENTENCE.

"The motion is to correct the judgment and sentence of June 12, 1946, by vacating the sentences imposed under Counts I and III of the indictment (Harrison Narcotic Act, 26 U.S.C. 2553, 2557) upon the ground that these Counts do not charge a legal offense against the United States.

"I am of the opinion that Counts I and III do charge an offense against the United States.

"The Congress has power to tax a prohibited import and hence the charge is valid. U. S. v. Yuginovich, 256 U. S. 450, 463.

"The argument that the Jones Miller Act of 1922 (21 U.S.C. 174) repealed by implication the tax on smoking opium previously imposed by the Harrison Narcotic Act, is not, in my opinion, good. McCool v. Smith, 66 U.S. 459, 470; United States v. Tynen, 78 U.S. 88, 92; Frost v. Wenie, 157 U.S. 46, 58; United States v. Greathouse, 166 U.S. 601, 605; United States v. Yuginovich, 256 U.S. 450, 463; United States v. Noce, 268 U.S. 613, 617; Posadas v. National City Bank, 296 U.S. 497, 503; United States v. Jackson, 302 U.S. 628, 631; United States v. Borden Co., 308 U.S.

188, 198; United States Alkali Assn. v. U.S., 325 U. S. 196, 209.

"The motion is denied.

"Dated November 24, 1948.

LOUIS E. GOODMAN,
United States District Judge.

(Endorsed): Filed Nov. 26, 1948." (Tr. 13, 14).

STATEMENT OF THE CASE.

Appellant was convicted in 1946 on an indictment in four counts, two of which charged violations of 26 U.S.C. 2553 (Harrison Narcotic Act) and two charged violations of 21 U.S.C. 174 (Narcotic Drug Import-Export Act). Appellant was sentenced to two years on the first count, and three years on the second count, to run consecutively, also to like terms on the third and fourth counts, to run concurrently with the sentences under the first and second counts. He now contends that the first and third counts, based under Section 2553 supra, do not charge legal offenses claiming that he could not be lawfully charged with unlawfully selling, dispensing or distributing smoking opium not in or from the original stamped package as charged in those counts, since there is no duty or tax on smoking opium and there is no "original stamped package" for smoking opium.

QUESTION.

Do the first and third counts of the indictment allege an offense against the United States?

CONTENTION OF APPELLEE.

The answer to the above stated question is: Yes.

ARGUMENT.

In substance, the basis of appellant's contention is that the Narcotic Drug Import-Export Act repealed by implication the laws of Congress imposing duty on imported smoking opium and as well the internal revenue tax on smoking opium produced in or imported into the United States. If this position is sound, then it would appear that no part of the Harrison Narcotic Act and its amendments would apply to imported prepared smoking opium. Likewise, the common practice of indicting on the separate counts, as here, would be improper.

It is fundamental that Congress may tax what it prohibits. *License Tax Cases,* 5 Wall. 462; *United States v. Yuginovich,* 256 U.S. 450; *In re Kollock,* 165 U.S. 526, and *United States v. Jin Fuey Moy,* 241 U.S. 394. Furthermore, repeals by implication are not favored. *McCool v. Smith,* 66 U.S. 459; *United States Alkali Export Association v. United States,* 325 U.S. 196, and others to like effect, cited by the Court below in its opinion.

Where such doctrine is applied by the Courts, usually the subsequent statute contains a smaller or different penalty for the violation denounced therein. *United States v. Yuginovich,* supra. As stated in *United States v. Tynen,* 78 U.S. 88, where there are two acts on the same subject, the latter embracing all the provisions of the first and new provisions with different penalties are provided, the latter act repeals the former. The penalty for violating the Narcotic Drug Import-Export Act is not more than $5,000.00 fine and not more than ten years in prison, whereas the punishment under the Harrison Narcotic Act for the offense charged is not more than $2,000.00 fine or not more than five years imprisonment or both. The former is based on Congressional power to control imports, while the latter is based on the revenue raising power, one prohibiting imports and the other taxing the product imported or produced. Thus, we have a different subject matter. However, where the subsequent statute is repugnant to the former, the earlier statute may well be considered to have been repealed by implication, unless there is a saving clause as stated in *United States v. One 6-54-B Oakland Touring Automobile* (D.C.) 9 F. (2d) 635. This of course would be subject to whether or not Congress had or has otherwise indicated an intention to the contrary. It is noted that the automobile was forfeited on other grounds. Furthermore, the statute imposing taxes on imported opium, etc. (26 U.S.C. 2550 (a)) was reenacted subsequent to this decision. Hence, we believe the intent not to effect repeal thereby is shown.

It should be noted in this connection that the original law prohibiting the importation of smoking opium was enacted in 1909, although it was amended and extended by the Narcotic Drug Import-Export Act in 1922, whereas the provision taxing opium, derivatives, or preparations thereof was imposed by the Harrison Narcotic Act in 1914, and is now 26 U.S.C. 2550(a). Furthermore, it should be noted as stated, that the Harrison Narcotic Act was amended from time to time in other respects and re-enacted as amended on several occasions since 1922, and retained the same provision imposing internal revenue taxes on imported opium, its derivatives and preparations therefrom, making no distinction therein between medicinal or non-medicinal products, or legal or illegal narcotics in that respect. It would be a strange application of the principle of repeal by implication to hold that a prior statute relating to and prohibiting imports repealed a subsequent statute imposing internal revenue taxes on smoking opium produced in or imported into the United States. Furthermore, it is noted that the Harrison Narcotic Act of 1914, which with its various amendments is the anti-narcotic law of today, was held not to affect the Act of January 17, 1914, amending the 1909 Act prohibiting importations of smoking opium and other narcotic drugs not intended for medical or scientific use. See *Gee Woe v. United States* (C.C.A. 5), 250 Fed. 428. Also, it is interesting to note that an early case, *Marks v. United States* (C.C.A. 2-1912), 196 Fed. 476, held that the 1909 Act prohibiting the importation of

opium for other than medical purposes did not repeal the Internal Revenue Act of October 1, 1890, taxing and regulating the manufacture of smoking opium.

The tax is imposed by the Harrison Act (now 26 U.S.C. 2550 (a)) on such articles produced in or imported into the United States and sold or removed for consumption or sale. In the meantime, to-wit, in 1922, the Narcotic Drug Import-Export Act was adopted by Congress and is really a re-enactment and extension of the old 1909 Act referred to above. Said Section 2550(a) contains a provision that the tax on opium and preparations thereof, etc., are in addition to any duties. The Harrison Narcotic Act as stated, was amended in other regards, but the tax on opium, its derivatives and preparations thereof remained. In that connection it also is interesting to note Paragraphs 36 and 59, Title 19 U.S.C. 1001. (Schedule 1, Par. 36 and 59, Tariff Act of 1930, and Schedule 1, Par. 36 and 60, Tariff Act of 1922.) The latter paragraph contains a provision to the effect that it shall not repeal or affect the Narcotic Drug Import-Export Act. Those paragraphs retain the import duties on cocoa leaves and opium and derivatives. One of these tariff acts was adopted in 1922 at approximately the same time as the Narcotic Drug Import-Export Act and the other in 1930.

Appellant's counsel cites 27 Op. Atty. Gen. 445 to support his point. This opinion held that the bringing of smoking opium to a port in the United States for transfer to another boat in the same port for reshipment abroad, did not constitute an importation

within the meaning of the customs laws; that prior to the Act of February 9, 1909, opium could not be brought into a port of this country and so exported without being subject to duty and that the Act of February 9, 1909, repealed by implication the prior law imposing duty on the smoking opium. This opinion was confined to the question of "duty" and was rendered prior to the passage of the Harrison Narcotic Act which imposed the internal revenue tax on all opium or derivatives thereof imported into or produced in the United States. It is noted that this opinion as explained therein was at variance with the case of *McLean v. Hager,* 31 Fed. 602, in the Northern District of California. Also, the necessity of passing on the question of repeal when holding that the situation did not constitute importation, is not clear. It is not believed that this opinion should be particularly persuasive here, especially since it is noted that the smoking opium could have been shipped across the United States and shipped out through another port lawfully, without incurring duty, but through a quirk in the law, there was no provision authorizing the transfer of opium from one boat to another in the same port. Then too, it should be noted, that the Attorney General was dealing with a law prohibiting imports as affecting a law imposing duty on imports, whereas the appellant now seeks to apply a law prohibiting imports to a law imposing an internal revenue tax.

While it is true, as stated by appellant's counsel, that 26 U.S.C. 2567 (Smoking Opium Act) has no

direct application here, this Act does impose a heavy tax on smoking opium made in this country and regulates such business. It has been in the statutes of the United States since 1914. It would be strange indeed that Congress intended to repeal by implication the internal revenue tax on imported smoking opium through the laws prohibiting its importation and leave the tax on the locally manufactured product. This should be an indication that Congress had no such intention. Aside from the revenue raising purpose of the Harrison Narcotic Act, there is an underlying purpose of restricting the illicit use of all forms of narcotics and preparations therefrom. Therefore, is it not unreasonable to conclude that Congress intended to free imported smoking opium from the tax and other regulatory provisions of the Harrison Narcotic Act as re-enacted? This is true despite the fact that the importation of smoking opium is prohibited and its legal manufacture in the United States is impractical since it is subject to seizure and summary forfeiture after having been imported or produced. However, if manufactured, the law does require it to be in appropriate stamped packages and hence the provisions in 26 U.S.C. 2553(a) may be invoked where a person sells, distributes, etc., such product from other than an original stamped package. The Bureau of Narcotics advises that such stamps exist, but none are used. No one wants them because of the other involvements resulting from the possession, etc., of smoking opium. Furthermore, the existence or availability of such stamps were matters, we believe, more appropriate for proof at the trial.

The case of *Ng Sing, et al. v. United States* (C.C.A. 9), 8 F. (2d) 919, quoted from by appellant's counsel, when read in its entirety, is favorable to the Government's position in the instant case. In that case the indictment was in two counts upon which the defendant was convicted. Although the citations of the statutes involved have been changed through codification, actually the same situation (separate counts under the same separate statutes) was presented to the appellate court there as here. The conviction on both counts was sustained, but it must be admitted that the court did not discuss repeal by implication.

It may be admitted that smoking opium as indicated in the *Ng Sing* case and *Chin Gum v. United States* (C.C.A. 1), 149 F. (2d) 575, also cited by appellant's counsel, is neither a remedy nor preparation sold as a medicine. However, we find no comfort for the defendant here in that case. *Chin Gum* was indicted for selling opium prepared for smoking without the appropriate order form under 26 U.S.C. 2554(a), which provides:

> "It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in Section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

It will be noted that Section 2550(a) is the very same section imposing the tax on opium, or preparations thereof, referred to in Section 2553(a), vio-

lation of which the contested count in the instant indictment charged, and the very same type of drug likewise was involved. Although stating as indicated above, that opium prepared for smoking is synonymous with smoking opium, the Court held that smoking opium or opium prepared for smoking are not within the exemptions in 26 U.S.C. 2551 (applicable to the provisions of Section 2550(a) and other provisions of Chapter 23, Internal Revenue Code and providing the only such exemptions.) It was to the contention by *Chin Gum* that the smoking opium was not proven as not being within such exemptions, that the appellate court, citing the *Ng Sing* case in sustaining his conviction, took judicial notice that smoking opium was not a remedy or preparation sold as a medicine, and hence not within the exemptions in Section 2551. While the section upon which the *Chin Gum* indictment was founded is not the same as here, it is manifest that if the smoking opium was not within the purview of Section 2550(a), there would have been no need for an order form, and if, as held by that Court of Appeals, smoking opium is a preparation within the meaning of Section 2550(a), no logical reason exists for concluding that the tax imposed by that section thereon is non-existent. Thus, there being a tax under Section 2550(a) on smoking opium imported into or produced in the United States, failure to comply with Section 2553(a) constitutes a separate and distinct law violation.

SUMMARY.

In summing up the appellee's position, the following salient points are respectfully called to the Court's attention:

1. That Congress may tax what it prohibits.

2. That repeals by implication are not favored.

3. That the subsequent re-enactments of the several laws are indicative that no repeal was intended.

4. That the internal revenue tax on narcotics is laid on legal or illegal narcotics without regard to their medicinal qualities, or the legal or illegal importation or manufacture thereof.

5. That the general history of the anti-narcotic laws shows no intent of Congress to repeal the tax on illicit narcotics and thus renounce its constitutional revenue raising power to deal internally with such articles, upon which power the Harrison Narcotic Act was founded.

6. That smoking opium is a preparation of opium within the meaning of 26 U.S.C. 2550.

7. That to avoid the consequences of 26 U.S.C. 2553, the narcotic drug must be dealt in, or from, the original stamped package.

8. That the offenses charged in the indictment are different and the sentence imposed by the court was within its judicial discretion and not excessive.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below denying appellant's motion to correct judgment and sentence is correct, and should be affirmed.

Dated, San Francisco, California,
February 24, 1949.

Respectfully submitted,

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